No. 95-860

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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

Barbara Smiley,
Petitioner,
v.

Citibank (South Dakota), N.A.,
Respondent.

On Writ of Certiorari to the California Supreme Court

BRIEF OF THE STATES OF COLORADO, DELAWARE, GEORGIA, ILLINOIS, MONTANA, NEBRASKA, NEVADA, NEW YORK, OHIO, SOUTH DAKOTA, AND UTAH, THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA, THE ARIZONA STATE BANKING DEPARTMENT, AND THE LOUISIANA OFFICE OF FINANCIAL INSTITUTIONS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae, the States of Colorado, Delaware, Georgia, Illinois, Montana, Nebraska, Nevada, New York, Ohio, South Dakota, and Utah, and the Commonwealths of Pennsylvania and Virginia, through their respective Attorneys General, the Arizona State Banking Department, through its Superintendent, and the State of Louisiana Office of Financial Institutions, through its Commissioner (the "States"), support the position of respondent Citibank (South Dakota), N.A. ("Citibank") in urging affirmance of the judgment of the California Supreme Court.[1] The States believe that the California Supreme Court correctly held that the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, includes late payment fees charged by national banks on credit card balances and other loans. The decision in this case will necessarily address at least two interests of great importance to the States and our residents: consumer welfare and the safety and soundness of banks.

The States have an important interest in promoting consumer welfare. Our consumers depend on credit cards every day, and they benefit from policies that promote broad access to credit, low credit card costs, and the ability to choose freely from the broadest possible range of different packages of rates and charges that are offered by credit card issuers.

The States also have an important interest in promoting the safety and soundness of banks located within our borders, and in ensuring predictability in the banking industry. Events of recent years have demonstrated that when banks sustain large and unexpected losses (such as those that they potentially face in this lawsuit and similar suits across the country), the well-being of the general

[1] Pursuant to Court Rule 37.3, this brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk's Office.

economy may suffer, to the detriment of all of our residents.

Affirmance of the judgment of the California Supreme Court would further the interests of our consumers and would also protect the safety and soundness of banks in our States. Reversal, however, would have precisely the opposite, profound effects. Consumers in our States and elsewhere would be significantly injured by decreased access to credit, higher costs of credit, and fewer options in the credit card market. In addition, banks in our States and throughout the country would be exposed to the potential of staggering damage awards that could threaten the safety and soundness of the banking system and, with it, the health of the entire economy. Reversal would also upset the settled expectations that support the smooth functioning of the national banking system that has served the country well for decades.

The States endorse the arguments made by respondent Citibank. Those arguments will not be repeated here. Rather, this brief focuses on the practical significance of this case to the States, to our consumers, and to the banks located within our borders. The States believe that our distinct perspective on the issues presented will materially assist the Court in resolving this case properly.

SUMMARY OF ARGUMENT

This is not, as petitioner and her *amici* suggest, a conventional preemption case. Section 85 effectively operates in the context of this case as a choice of law rule. In interstate credit card transactions, there is always an inherent conflict of laws problem. The home state of the bank, the state of the borrower's residence, and even the state in which the purchase or cash advance is made, each has a connection with, and potentially an interest in, the proper legal standards that govern the transaction. Section 85 resolves one source of conflict by providing, as a matter of federal law, a clear and uniform rule that the

propriety of the "interest" charged by a bank is determined by the substantive law of the bank's home state.

Consequently, although this case has enormous practical significance to all segments of the economy of our States, at bottom it presents nothing more than a straightforward quesion of statutory interpretation of the meaning of the term "interest" in section 85 of the National Bank Act. Based upon the widespread use of that term in nineteenth century judicial opinions and today, it is clear that "interest," as used by Congress in 1864, includes late charges. However, even assuming for the sake of argument that the term, at least viewed in isolation, were potentially ambiguous, the construction of section 85 reached by the California Supreme Court (and the vast majority of other courts) should nonetheless be affirmed. Under settled rules of statutory construction, this Court should look to whether the Office of the Comptroller of the Currency ("OCC")—the federal agency charged with administering the National Bank Act—has issued an authoritative interpretation of the meaning of this language. For years, the OCC has in letter rulings expressed the view that the term "interest" in section 85 includes late fees. More recently, the OCC promulgated a final rule, following a notice and comment period, formalizing its interpretation of section 85. The Court should defer to this reasonable and long-standing construction of the relevant language in section 85.

There are particularly strong reasons for according deference to the OCC's interpretation of the term "interest" in section 85. Bank regulators in our States rely upon and obtain substantial guidance from the interpretations of the National Bank Act and other federal banking laws issued by the OCC, the FDIC, and other federal regulatory agencies. Moreover, in reliance upon the OCC's publicly stated position, banks in our States have loaned literally hundreds of billions of dollars to consumers across the country. In interpreting a potentially ambiguous stat-

ute, great weight should be accorded to those reliance interests. Given the amounts at stake in this case, accepting petitioner's argument would have a potentially devastating effect on banks in our States. That harm to the banking industry could, in turn, have a profoundly harmful effect on the entire economy of each of our States, on our businesses, and on our consumers.

In addition, construing "interest" in section 85 to include late fees promotes consumer welfare. Consumers benefit from broad access to credit, lower credit costs, and above all the ability to choose from the broadest possible range of competing credit cards in the marketplace. The conclusion reached by the California Supreme Court furthers those interests. Affirmance would enable consumers in our States to continue to choose from a broad array of credit cards, some of which will be offered by banks in states with little regulation and others of which will be offered by banks in states with greater regulation. The Federal Truth In Lending Act, 15 U.S.C. § 1601 *et seq.*, as well as state disclosure laws and antifraud protections, ensure that consumers throughout the country will have access to the competitive information necessary for them to make informed choices as to what type of credit arrangement best suits their needs.

Finally, affirmance of the judgment of the California Supreme Court would protect the traditional prerogative of the States to set the terms upon which banks located within our borders may lend money. In stark contrast, our States have comparatively little interest in regulating the terms of a transaction in which our residents voluntarily have made the choice to borrow money from a national bank in *another* state, leaving behind the rate limitations of our States. Because section 85 as interpreted by the OCC and the California Supreme Court implements this basic balancing of the relevant interests of the States, the judgment of the California Supreme Court should be affirmed.

ARGUMENT

I. SECTION 85 RECOGNIZES THE CENTRALITY OF STATE LAW IN BANKING REGULATION.

In our country's dual system of banking, banks have historically been regulated by their chartering authority—national banks by the federal government, and state banks by the state governments that charter them. See Emmanuel N. Roussakis, *Commercial Banking in an Era of Deregulation* 60 (2d ed. 1989); Kenneth E. Scott, *The Dual Banking System*, 30 Stan. L. Rev. 1, 5 (1977). This structure of regulation and oversight has applied generally to banks regardless of whether the banks are engaged in intrastate or interstate transactions.

Section 85 of the National Bank Act, 12 U.S.C. § 85, provides that national banks may charge "interest at the rate allowed by the laws of the State . . . *where the bank is located*" (emphasis added). Thus, when a national bank makes a loan (intrastate or interstate), the interest charges that it may assess are determined by the law of the bank's home state. The location of the borrower's residence—whether next-door to the bank, in the same state as the bank, in a different state, or even in a different country—is irrelevant. All customers who borrow from a particular national bank, therefore, are treated the same, regardless of their state of residence.[2]

[2] Section 85 of the National Bank Act applies to national banks, such as respondent Citibank. In addition, virtually all state-chartered banks are federally insured, and federally insured state banks are subject to section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d, which was modeled on 12 U.S.C. § 85. *See* 12 U.S.C. § 1831d(a) (stating, in pertinent part, that a federally insured state bank may charge interest "at the rate allowed by the laws of the State, territory, or district where the bank is located"). Similar statutory provisions apply to all federally chartered and federally insured state-chartered saving associations, 12 U.S.C. § 1463(g)(1), and all federally chartered and federally insured state-chartered credit unions, 12 U.S.C. § 1785(g)(1). As a result,

A. Section 85 Provides A Uniform National Choice Of Law Rule For Interstate Loans.

This is not, as petitioner and her *amici* contend, a conventional preemption case. The effect of section 85 in this case is *not* to displace substantive state law with substantive federal law. Rather, section 85 operates in this context as a choice of law statute. Section 85, in effect, provides a uniform national choice of law rule for interstate loans. Thus, rather than arrogating power to the federal government to impose special federal rules, section 85 takes a different approach that acknowledges the centrality of state concerns and state law, and resolves what might otherwise be complex questions as to which state's law is applicable to a particular interstate loan.

In interstate bank loans (including credit card loans), there are always at least two states potentially interested in the transaction, namely the bank's home state and the borrower's home state.[3] In the absence of section 85, the roles of the law of the bank's home state and the borrower's home state would have to be resolved according to general choice of law principles. See, *e.g.*, Restatement (Second) of Conflict of Laws §§ 188, 195 (1971). Because the application of conflict of laws principles all too often varies with the eye of the beholder, reliance upon those principles would ensure disuniformity in the

the Court's construction of section 85 in this case will directly affect almost all financial institutions in the country.

[3] A third state, the state in which the credit card purchase or cash advance is made, may also have an interest in the transaction. *See* William F. Baxter, *Section 85 of the National Bank Act and Consumer Welfare*, 1995 Utah L. Rev. 1009, 1024 & n.50 (1995). As a result, even a relatively simple series of transactions—in which, for example, a California resident makes two telephone calls from home and, with a credit card issued by a bank in Ohio, purchases an airline ticket (on a carrier with its main office in Texas) and makes a reservation in a hotel (in a chain with its main office in Illinois) for a ski holiday in Utah—has the potential for raising difficult and complex conflict of laws issues.

law. In such a situation, the courts would routinely be called upon to resolve those conflicts.

Section 85 resolves that problem for loans made by national banks. Section 85 states, in plain terms, that a national bank may charge on its loans "interest at the rate allowed by the laws of the State . . . *where the bank is located*" (emphasis added). Thus, section 85 effectively provides a uniform national choice of law rule. As a matter of federal law, the law of the bank's home state determines the interest charges that a national bank may assess on all of its loans, both intrastate and interstate.[4]

In enacting section 85, Congress sought to preserve the already established prerogatives of the states to determine the interest that banks located within their borders could charge. Section 85 recognizes the historic importance of substantive *state law* in determining permissible interest charges. Ascertaining which lending charges constitute "interest" under section 85 is a matter of federal law. Once that determination is made, however, the substantive law of the bank's home state determines whether the bank's "interest" charges are permissible.

Of course, Congress was not required to preserve the historic prerogatives of the states. In the exercise of its plenary authority over interstate commerce, Congress could have enacted a standard preemption statute that imposed a single, uniform limit on lending rates for national banks across the country and displaced all state law. Indeed, the House of Representatives originally approved such a preemption provision, imposing a uniform maximum interest rate of seven percent for all loans (intrastate or interstate) made by national banks. See

[4] The States recognize that section 85 has a number of other purposes, provisions, and effects that have different federalism implications. Those other aspects of section 85 are not implicated in this case, and are therefore not addressed in this brief. Rather, the States address in this brief only the provision of section 85 that is pertinent to the facts of this case.

Marquette Nat'l Bank v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 318 n.31 (1978) (citing Cong. Globe, 38th Cong., 1st Sess. 1866 (1864)).

In the Senate, however, the bill was amended, and the current language of section 85 was added. See John Jay Knox, *A History of Banking in the United States* 255-56 (1903, 1969 reprint); Citibank Br. at 33-35. That decision was critically important. Mindful of basic principles of federalism, Congress rejected a rigid preemption approach to the regulation of national banks that would have trampled upon the traditional prerogatives of all of the states. Instead, Congress reserved to each state the power to make its own policy judgment on the interest limitations that would best serve the objectives of that state. Congress decided that, as a matter of federal law, the law of the bank's home state would determine the interest that a national bank may charge, even when the borrower resides in a different state.[5]

Thus, in the context of this case, section 85 does not operate at all like a conventional preemption statute. In a conventional preemption case, there is a conflict between

[5] Congress has also recognized the importance of state banking law in provisions subsequently added to the National Bank Act. *See, e.g.*, 12 U.S.C. § 36(c) (providing that a national bank may "within the approval of the Comptroller of the Currency, establish and operate new branches" within geographical limits "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question"); 12 U.S.C. § 90 (upon deposit of funds by a state or state government agency, a national bank may "give security for the safekeeping and prompt payment of the funds so deposited to the same extent and of the same kind as is authorized by the law of the State in which [the national bank] is located in the case of other banking institutions in the State"); 12 U.S.C. § 92a (Comptroller of the Currency may grant a national bank the power "to act as trustee, executor, administrator, . . . or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located").

substantive federal and substantive state law. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the federal law displaces the state law, and the state law is rendered entirely void and "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

In this case, however, the effect of section 85 is not to displace substantive *state* law with substantive *federal* law. Rather, as described above, section 85 serves to determine which state's law determines the permissible interest on an interstate loan transaction.

Moreover, Section 85 does not render the substantive law of California or any other state null and void. To the contrary, section 85 effectively preserves state law. Under section 85, the law of California determines the interest charges that a national bank located in that state may assess—whether its loans are made to residents of California or elsewhere.[6]

To be sure, section 85 does cause some displacement of state law: in an interstate loan, the law of the borrower's home state is displaced by the law of the bank's home state. But that displacement, alone, does not transform section 85 from a choice of law statute into a preemption statute. Rather, the displacement of the law of one state by the law of another is inherent in any conflict of laws determination. In any conflict of laws case, the law of one state "wins" and the law of another state "loses." That

[6] This Court recognized in *Marquette National Bank* that a consumer who borrows money from an out-of-state bank is deemed to have travelled to the bank to obtain the loan. 439 U.S. at 311. That is consistent with the structure of the National Bank Act, which prohibits a national bank from making loans at any location other than its home office or its branches. 12 U.S.C. §§ 36(j), 81. It is therefore unremarkable that Congress would determine in section 85 that the loan transaction should be governed by the law of the state in which the lender resides *and* in which the transaction occurs.

occurs without impairing state sovereignty or implicating conventional preemption concerns.[7]

Accordingly, conventional preemption concerns are simply not present in this case. This is not a case in which "the historic police powers of the States [are being] superseded by [a] Federal Act." *Cippollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Nor is this a case in which the historic prerogatives of the states are in need of "protection . . . against intrusive exercises of Congress' Commerce Clause powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991). If it were, our States would not be before this Court urging affirmance of the decision of the California Supreme Court.

In adopting section 85, Congress chose to preserve the historic prerogatives of the states in determining the interest charges that banks located within their borders could assess. Congress did *not* enact a uniform set of national standards for the lending practices of national banks designed to preempt all contrary state law. Rather, Congress decided (as a matter of federal law) to incorporate the law of the bank's home state on this subject, thereby preserving to a great extent the traditional role of the states in bank regulation.

B. Petitioner's Construction Of The Scope Of The Choice Of Law Rule In Section 85 Would Lead To Uncertainty And Confusion In The Interstate Loan Market.

This Court has previously had an opportunity to review the meaning and scope of section 85. In the landmark decision in *Marquette National Bank, supra*, the respondent,

[7] For this reason, petitioner's argument that section 85 is an unconstitutional delegation of legislative power is incorrect. Any time a resident of California enters into a transaction with the resident of another state, there is the possibility—under standard conflict of laws rules—that the law of California may be displaced by the law of another state.

a national bank located in Nebraska, charged an 18 percent annual percentage rate ("APR") on all of its credit card accounts, including those held by residents of Minnesota. The 18 percent APR was permitted by Nebraska law, but violated Minnesota law. 439 U.S. at 302. In a unanimous opinion, the Court upheld the bank's loan charges. The Court cited the plain language of section 85 and held that the statute permits a national bank to charge all of its borrowers the APR permitted by the law of the bank's home state, even if that APR violates the law of the borrower's home state. *Id.* at 313.

In reaching that result, the Court recognized in *Marquette National Bank* that interstate credit card loans are made in the home state of the bank. The card holders are recognized as having come to the bank to obtain the loans. *Id.* at 311. Accordingly, the Court viewed interstate credit card loans as simply a modern-day example of the long-standing practice of interstate lending in this country. As the Court observed, "citizens of one State" have always been "free to visit a neighboring State to receive credit at foreign interest rates." *Id.* at 318.[8]

In *Marquette National Bank*, the loan charge at issue was the APR. Here, the question is whether section 85 also applies to late fees.

The California Supreme Court held that the term "interest" in section 85 includes late fees, and therefore that the rule in section 85 applies to those late fees. The state court's holding regarding the scope of section 85 is correct and benefits both borrowers and banks by providing certainty and predictability to interstate loan transactions.

[8] The holding of *Marquette National Bank* is sometimes described as the "exportation" of the law of the bank's home state to the borrower's home state. That is not, however, quite accurate. Because the loan is actually made at the bank, the application of the law of the bank's home state does not require the "exportation" of any law. To the contrary, exportation would have occurred in fact only if *Marquette National Bank* had held that the law of the borrower's state governed a transaction in the bank's home state.

At the time that the loan or credit card agreement is made, all of the parties know that the law of the bank's home state will determine the validity of the charges assessed by the bank.

If this Court were to reverse the state court's ruling, however, the result would *not* be, as petitioner and her *amici* suggest, that the law of the borrower's home state would automatically govern the permissibility of late charges. Rather, because the interests of at least two states are always involved in interstate loans, a difficult choice of law issue would arise that would need to be resolved through litigation in each of the 50 states, with each state applying its own conflict of laws rules. Until that issue were conclusively resolved in each of the 50 states, a virtual impossibility,[9] banks and card holders would not know whether the law of the bank's home state or the state of the card holder's residence—or potentially even the law of the state in which the purchase or cash advance was made—would apply.

Almost certainly, in the absence of the uniform choice of law rule provided by section 85, the states would reach

[9] The conflict of laws issue will never be truly "conclusively resolved," as states' approaches to conflicts of law questions may change over time. *See, e.g.*, Eugene F. Scoles & Peter Hay, *Conflict of Laws* 11-44 (2d ed. 1992) (describing evolution of general choice of law standards in the United States); *Duncan* v. *Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984) (rejecting traditional contract law rule of *lex loci contractus*, which applied the law of the state in which the contract was made, in favor of a rule applying the law of the state with the "most significant relationship" to the transaction); *Choate, Hall & Stewart* v. *SCA Servs., Inc.*, 392 N.E.2d 1045, 1048-49 (Mass. 1979) (also rejecting *lex loci contractus* rule); *Lilienthal* v. *Kaufman*, 395 P.2d 543, 545-47 (Or. 1964) (same); *Babcock* v. *Jackson*, 191 N.E.2d 279, 283-84 (N.Y. 1963) (rejecting traditional tort law rule of *lex loci delicti commissi*, which applied the law of the state in which the tort was committed, in favor of an approach comparing the interests of the competing states); *Reich* v. *Purcell*, 432 P.2d 727, 729-31 (Cal. 1967) (also rejecting *lex loci delicti commissi* rule).

different results through their choice of laws analysis. Some states, depending on their views of the interests of the competing states in governing the transaction and the lending charge at issue, would likely apply the law of the state of the borrower's residence to late charges.[10] Others would likely apply the law of the bank's home state.[11] As a result, determining which law applied to the various charges in a certain loan transaction might ultimately depend on the forum in which the litigation was brought.[12]

[10] *See, e.g.*, *Commercial Credit Equip. Corp.* v. *West*, 677 S.W.2d 669, 674 (Tex. Ct. App. 1984) (applying law of consumer's state in case involving purchase financing); *Dassault Falcon Jet Corp.* v. *Oberflex, Inc.*, 909 F. Supp. 345, 353 (M.D.N.C. 1995) (applying law of consumer's state in case involving sale of goods); *D.P. Technology Corp.* v. *Sherwood Tool, Inc.*, 751 F. Supp. 1038, 1040 (D. Conn. 1990) (applying law of commercial purchaser's state); *Collins Radio Co.* v. *Bell*, 623 P.2d 1039, 1045-48 (Okla. Ct. App. 1980) (same).

[11] *See, e.g.*, *Connecticut Nat'l Bank* v. *Kommit*, 577 N.E.2d 639, 640-41 (Mass. App. Ct. 1991) (enforcing choice of law clause in credit card agreement providing that law of bank's home state governs transaction); *Finance Am. Corp.* v. *Moyler*, 494 A.2d 926, 928-30 (D.C. 1985) (applying law of finance company's home state in consumer loan case); *OFS Equities, Inc.* v. *Conde*, 421 So. 2d 651, 653 (Fla. Dist. Ct. App. 1982) (applying law of lender's home state under "validation principle"); *Commercial Credit Plan, Inc.* v. *Parker*, 263 S.E.2d 220, 222 (Ga. Ct. App. 1979) (applying law of finance company's home state in consumer loan case); *Walker* v. *Associates Fin. Servs. Corp.*, 588 S.W.2d 416, 417-18 (Tex. Ct. App. 1979) (same); *cf. McBride* v. *Minstar, Inc.*, 662 A.2d 592, 598-99 (N.J. Super. Ct.) (holding that Massachusetts law governs both contract and tort claims of New Jersey resident who purchased ski equipment from retailer in Massachusetts), *aff'd sub nom. McBride* v. *Raichle Molitor, USA*, 662 A.2d 567 (N.J. Super. Ct. App. Div. 1995).

[12] If, for example, a court of Illinois determined, applying its conflict of laws rules, that Illinois law applies when a resident of Illinois borrows money from a bank in Ohio, courts in Ohio would of course be required to give full faith and credit to the final judgment of the Illinois court. U.S. Const. art. IV, § 1. In a case involving the same issues but different parties, however, the courts of Ohio would be free to reach a different result.

The inevitable result would be forum shopping with its devastatingly harmful effects on the administration of justice. See, *e.g.*, *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74-77 (1938) (condemning forum shopping). This structural (and perpetual) uncertainty would impose unnecessary costs on both banks and card holders and would further no one's legitimate interests.

Regardless of how the individual states were to resolve these difficult choice of law issues, the result of petitioner's construction of section 85 would be to balkanize the regulation of banks. The States would lose our historic prerogative to set the terms upon which the banks located within our borders may lend money. Instead, the interest charges on loans made by banks located within our borders would be regulated in part by our States and in part by the law of each state in which the credit card holder resides or the credit card purchase is made. This is an intolerable situation that could only be justified by the clearest evidence of congressional intent.

II. UNDER SETTLED RULES OF STATUTORY CONSTRUCTION, THE JUDGMENT OF THE CALIFORNIA SUPREME COURT SHOULD BE AFFIRMED.

This case presents a straightforward question of statutory construction. As explained above, section 85 operates here in effect as a choice of law rule, not as a statute preempting substantive state law, and does not raise the states' rights or federalism concerns normally associated with conventional preemption statutes. Accordingly, this case should not be governed by the principles of statutory interpretation that apply in the context of preemption. See, *e.g.*, Pet. Br. at 12-18. Rather, the standard and settled rules of statutory construction should apply. The judgment of the California Supreme Court should be affirmed because its interpretation of section 85 is consistent with (1) the language of the statute as inter-

preted in the formally adopted rule of the OCC, the federal agency charged with administering the National Bank Act, (2) the policies and purposes of Congress in enacting the National Bank Act, and (3) economic reality and this Court's prior rulings.

A. Deference To The OCC's Interpretation Of Section 85 Is Appropriate And Essential To Ensuring The Safety And Soundness Of Banks Within Our Borders.

Numerous nineteenth century statutes and cases define or use the word "interest" in a broad sense, to include all payments for the use of funds, including damages for the detention of funds past the maturity date of the loan. See Citibank Br. at 16-21, 25-30. Thus, the plain meaning of the statute in 1864 and today is a sufficient basis in itself to affirm the decision below.

In arguing for a different interpretation of section 85, petitioner is unable to demonstrate that the language of the statute compels the conclusion that late charges must be excluded from its sweep. In her opening brief, petitioner concedes as much, acknowledging that "interest" in section 85 is not limited to the APR, but may also include other fees in certain circumstances. See, *e.g.*, Pet. Br. at 30-31 & n.14. At bottom, all that petitioner attempts to show is that the term "interest" in section 85, read in isolation, is potentially ambiguous.

The proper resolution of this case, however, is the same whether the statutory language is deemed to be plain or ambiguous. That is because when a statute is ambiguous, the first rule of federal statutory interpretation directs courts to determine whether the federal agency charged with administering the statute has issued an authoritative interpretation of the relevant language. As the Court has explained:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with

> two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); see also, *e.g.*, *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995) ("It is well settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.").

The OCC is charged with administering the National Bank Act. 12 U.S.C. §§ 1, 26-27, 481; *Nationsbank*, 115 S. Ct. at 813. The OCC's interpretation of any ambiguity in the National Bank Act is therefore entitled to deference by the courts, and any reasonable interpretation of the Act by the OCC is conclusive of the issue. *Id.* This deference is based, in part, on the fact that Congress has delegated this policy-laden task to an administrative agency and, in part, on the recognition that administrative agencies develop a high level of expertise in their complex regulatory fields. See, *e.g.*, *Chevron*, 467 U.S. at 864-66; Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2086-90 (1990). It is neither institutionally appropriate nor wise policy for federal courts to interfere with the judgments made by the OCC.

The OCC recently promulgated a final rule expressly interpreting the word "interest" in section 85. The OCC's rule states:

> The term "interest" as used in 12 U.S.C. § 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. *It includes, among other things, . . . late fees . . . .*

61 Fed. Reg. 4849, 4869 (Feb. 9, 1996) (emphasis added) (to be codified at 12 C.F.R. § 7.4001(a)). This rule is consistent with opinion letters issued by the OCC in 1980, 1988 and 1992,[13] with statements issued by other federal banking agencies,[14] and with the overwhelming majority of lower court cases holding that the term "interest" in section 85 and in section 521 of the DIDA includes late fees and other charges incident to the extension of credit.[15]

As respondent ably demonstrates, the conditions for deference to the OCC are met in this case. Citibank Br.

[13] Letter of William P. Bowden, Jr., OCC Chief Counsel, 1992 WL 136390 (OCC) (Feb. 4, 1992); OCC Interpretive Ltr. No. 452, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 (Aug. 11, 1988); Letter from Richard V. Fitzgerald, Director, OCC Legal Advisory Services Division (Nov. 24, 1980).

[14] Letter of Harry Quillian, Acting General Counsel, FHLBB (June 27, 1986), attached to Letter of Karen Solomon, Deputy Chief Counsel, Office of Thrift Supervision (Sept. 29, 1994), in Current Developments, Fed. Banking L. Rep. (CCH) ¶ 82,852 (Dec. 16, 1994); Advisory Op. No. FDIC-92-47, [1992-93 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 (July 8, 1992).

[15] *E.g.*, *Cades* v. *H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994) (flat $29 charge for tax refund anticipation loans), *cert. denied*, 115 S. Ct. 2247 (1995); *Greenwood Trust Co.* v. *Massachusetts*, 971 F.2d 818, 829 (1st Cir. 1992) (noting that courts construing section 85 "have had little trouble in construing the term 'interest' to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate"), *cert. denied*, 506 U.S. 1052 (1993); *American Timber & Trading Co.* v. *First Nat'l Bank*, 690 F.2d 781 (9th Cir. 1982) (charges incurred under compensating balance requirements); *Fisher* v. *First Nat'l Bank*, 548 F.2d 255 (8th Cir. 1977) (credit card cash fees); *Northway Lanes* v. *Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972) (closing costs).

at 35-41. Accordingly, under the principles of *Chevron* and its progeny, the Court should defer to the authoritative interpretation of the National Bank Act promulgated by the OCC.

In addition, there are particularly compelling reasons here for according deference to the OCC's interpretation of the National Bank Act. First, banking officials in our States are involved on a daily basis in the supervision, examination, and regulation of state-chartered banks. State banking officials rely as a matter of course upon the official pronouncements of the OCC, the FDIC, and other federal bank regulatory agencies in interpreting the myriad federal statutes that apply to state banks. That reliance promotes certainty and efficiency in bank regulation, and accords proper respect to the role assigned by Congress to the expertise developed by the federal agencies in this field.

Specifically in this case, bank regulators in our States relied upon the OCC's interpretation of the National Bank Act to ensure that banks subject to our regulatory jurisdiction were in full compliance with applicable laws. If the OCC or FDIC had taken a different position regarding the meaning of section 85, our bank regulators would have reexamined the issue to ensure that the state-chartered banks located in our States were complying with the law.

Reversing the OCC's interpretation of the National Bank Act, however, would upset the settled and reasonable expectations regarding the meaning of section 85 in the industry and would undermine the certainty and efficiency interests set forth above. If the OCC's interpretation of section 85 were discarded, then the ability of state regulators to assume the validity of stated interpretations of federal banking statutes issued by federal banking agencies would be severely diminished, if not eliminated altogether.

Second, the banks within our borders also rely upon the statements of federal banking agencies in ensuring that

their practices are in accordance with the law. In reliance upon the OCC's interpretation of the National Bank Act, banks in our States have loaned literally hundreds of billions of dollars to consumers across the country. Given the amount of money at stake in this case, accepting petitioner's interpretation of the National Bank Act would have a seriously harmful effect on banks in our States. Individual banks would suddenly and unexpectedly be exposed to significant damage claims. Collectively these claims could readily exceed billions of dollars.

Moreover, the harm would not be limited to the banking industry. Rather, the potentially massive liability of banks could have an adverse effect on the entire economy of most, if not all, of the States. The ultimate impact could be loss of jobs, loss of tax revenues, and an overall tightening of credit. As a result, businesses, consumers, and all residents in this nation would suffer.

In interpreting section 85, great weight should be accorded to justifiable reliance interests. The substantial history of reliance, and the potential widespread harm that would result from undermining the reliance interests, counsel strongly against the adoption of a new, unsupported interpretation of the National Bank Act. See, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-58 (1978) ("In light of these substantial reliance interests, the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons.' "); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975) (deferring to EPA's interpretation of Clean Air Act in part because "there has undoubtedly been reliance upon [the EPA's] interpretation by the States and other parties affected by the Act"); 2B Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 49.07, at 62 (5th ed. 1992) (one reason for sustaining a long-standing statutory interpretation "is the fact that the public has relied on the interpretation").

B. The State Court's Construction Of Section 85 Furthers Congress' Purposes In Enacting The National Bank Act.

Interstate lending was a well-established practice in this country long before the National Bank Act was adopted. *Marquette Nat'l Bank*, 439 U.S. at 317. Through the National Bank Act, "Congress intended to facilitate . . . a 'national banking system,'" *id.* at 314-15, to create "a banking system of great regional interdependence," *id.* at 316, and to promote interstate lending generally, *id.* at 314-18. The California Supreme Court's construction of the National Bank Act furthers the Act's manifest purposes.

First, the state court's ruling provides certainty and predictability to interstate lending. Banks may lend money to borrowers in other states knowing with certainty that only the law of the bank's home state, not the law of any other state, will govern the transaction.

Accepting petitioner's interpretation of the National Bank Act, however, would, as already demonstrated (*supra*, pp. 12-14), have precisely the opposite effect, causing substantial uncertainty. In the face of that uncertainty, banks would be likely to adopt conservative lending practices that would increase the cost of credit and would restrict access to credit. Moreover, banks that continued to make interstate loans and to issue credit cards to out-of-state customers would risk incurring enormous liability in class actions, such as this one, if they were to predict wrongly which state's law applied to certain loan charges. See William C. Dunkelberg, *Litigation Concerning Late Charges is Major Threat to Credit Card Business*, Banking Pol'y Rep. (Prentice Hall), Apr. 6, 1992, at 1, 15-16. No prudent lender will take that risk.

Second, the California Supreme Court's construction of the National Bank Act promotes efficiency and reduces costs in interstate lending. Under the state court's ruling, banks need to monitor statutory, regulatory, and judicial

developments in banking law in only one state—the bank's home state. The cost of administering interstate loans and credit card accounts remains low, because all loans and accounts are governed by one set of laws.

Petitioner's interpretation of the statute, however, would impose substantial administrative burdens on banks. To engage in interstate lending, banks would be required to design and maintain a system that would incorporate all statutory, regulatory, and judicial law relating to loan charges in all 50 states—and to monitor the statutory, regulatory, and judicial changes in the law in each state—in order to ensure that each borrower was being assessed the correct charges for each loan. See William F. Baxter, *Section 85 of the National Bank Act and Consumer Welfare*, 1995 Utah L. Rev. 1009, 1024 (1995). Requiring banks to comply with myriad, conflicting laws in each jurisdiction where their credit card holders and other borrowers reside would undermine certainty and predictability in interstate lending, and could, as this Court has stated, "throw into confusion the complex system of modern interstate banking." *Marquette Nat'l Bank*, 439 U.S. at 312. At the very least, accepting petitioner's argument would cause an increase in the cost of interstate lending and a reduction in the amount of interstate lending—precisely the opposite of what Congress intended when it adopted the Act.

C. The California Supreme Court's Construction Of Section 85 Is Consistent With The Economics Of Credit Pricing And Thus Constitutes A Common Sense Approach To Applying The Statute.

Banks typically charge a number of closely related fees for credit cards. The most prominent of these fees is the APR. Other fees include the late charges at issue in this case, as well as annual fees, over-the-limit fees, and fees for returned checks used to pay off a credit card balance. All of these fees, in the aggregate, constitute the "price" of the credit card to the consumer.

The application of section 85 to one of these fees—the APR—was settled by this Court in *Marquette National Bank.* As noted above, the Court held that section 85 allows a national bank to charge the APR permitted by the law of its home state, even if that APR violates the law of the borrower's home state. 439 U.S. at 313.

The instant case involves late fees, and not the APR. But late fees and APR are simply two components of the price of credit to the card holder. There is no basis in logic or economics to treat the loan differently, or to apply a different choice of law rule, simply because a late fee, rather than the APR, is at issue. Indeed, one court has aptly stated that the definition of "interest" in section 85 should be governed by "[w]hat affects the borrower's pocketbook . . . , not semantics." *First Nat'l Bank* v. *Nowlin*, 509 F.2d 872, 878 (8th Cir. 1975).

Moreover, as noted above, Congress' intent in enacting the National Bank Act was to promote interstate banking while at the same time preserving the states' historic prerogatives with regard to bank regulation. The intent that petitioner imputes to Congress, however, is wholly implausible. According to petitioner, Congress actually intended in 1864 to preserve the states' traditional role in controlling certain loan charges, but at the same time intended to *deprive* the states of that role with regard to other, closely related loan charges.[16] There is no evidence and no reason to assume that Congress intended to create such an illogical and unworkable regulatory scheme.

[16] As respondent shows, in the context of intrastate loans by a national bank, the term "interest" must include late charges. Because there is no reason to believe that the term should have a different meaning for interstate loans, "interest" must also include late charges on interstate loans. Citibank Br. at 35.

III. SECTION 85 PROMOTES BOTH THE INTERESTS OF CONSUMERS AND THE ABILITY OF EACH STATE TO PROTECT ITS RESIDENTS AS IT SEES FIT.

Consumers in our States and across the country benefit from broad access to credit, low credit card costs, and the ability to choose from the broadest possible range of competing credit cards, offering the broadest possible range of packages of rates and charges, in the marketplace. The Truth In Lending Act, 15 U.S.C. § 1601 *et seq.*, state disclosure laws, and state anti-fraud protections ensure that credit card issuers must disclose all material terms so that consumers are able to make informed choices among competing credit card products. Any state that is dissatisfied with existing protections can enhance its own disclosure and anti-fraud laws. It is no solution to make a substantive shambles of the interstate banking system, which has served the nation well for decades.

With the broadest possible range of choices in the market and the extensive disclosures required by the Truth In Lending Act, consumers are able to obtain credit cards that fit their individual usage and payment preferences. For example, consumers who pay the outstanding balance in full each month are likely to choose a credit card that does not charge an annual fee and that offers perquisites such as airline frequent flier miles or no-cost insurance on rental cars, even if the card also charges a relatively high APR and imposes late fees. In contrast, consumers who plan to use a card for easy access to unsecured credit are likely to choose a card that offers a low APR and no late charges, even if the card also charges an annual fee and offers no "perks." See David S. Evans & Richard L. Schmalensee, *The Economics of the Payment Card Industry* 51, 58-60 (1993); Christopher C. DeMuth, *The Case Against Credit Card Interest Regulation*, 3 Yale J. on Reg. 201, 236, 238-39 (1986).

The California Supreme Court's construction of section 85 promotes broad competition in the interstate credit

card market. Banks will be able to issue cards to consumers across the country with the certainty that the law of the bank's home state will govern not only the APR but also late charges. As a result, consumers in our States will be able to choose from a broad array of competing credit cards, some of which will be offered by banks in states which restrict some loan charges and others of which will be offered by banks in states with no such restrictions.

For example, Minnesota law severely limits the ability of banks to charge late fees, Minn. Stat. § 48.185(4), but banks in Ohio are permitted to offer cards that do charge late fees, Ohio Rev. Code § 1107.262(A). When competing for customers against Minnesota card issuers—whether in Ohio, Minnesota, or somewhere else—the Ohio banks must offer other, more favorable terms (for example, a low APR or no annual fee) in order to compete with cards from the Minnesota banks that do not charge late fees. Thus, consumers in every state will be able to choose between (1) cards from banks in Minnesota, which do not assess late charges and (2) cards from banks in Ohio, which do assess late charges but in return offer a low APR or no annual fee. Under petitioner's construction of section 85, in contrast, consumers would have fewer choices and would therefore be worse off. See Baxter, at 1020-21; DeMuth, at 231, 239.[17]

By permitting each state to set its own policy concerning credit card fees and charges that governs its home

[17] Contrary to the suggestion of one of petitioner's *amici*, nothing in the California Supreme Court's interpretation of section 85 would give out-of-state national banks a competitive advantage over local banks, even if by law they are permitted to charge more than local banks. In the example above, if the Ohio bank charges late fees without offering a low APR or no annual fee to its Minnesota customers, it will be at a competitive *disadvantage* compared to Minnesota banks. Consumers in Minnesota will choose to obtain credit cards from Minnesota banks, which will be offering a lower overall price for credit cards.

banks' practices, the California Supreme Court's interpretation of section 85 benefits consumers in our States and throughout the country. It permits banks to offer consumers a wide variety of credit card products in an industry that is characterized by intense competition. Evans & Schmalensee, at 68-71; Baxter, at 1013-19; DeMuth, at 222-26. Armed with a variety of choices offered by banks and other credit card issuers, and with full disclosure of credit terms, including late fees, mandated by federal law, consumers will continue to have the credit card product that best suits their particular needs.

In an attempt to argue that the California Supreme Court's interpretation of section 85 will harm consumers, petitioner and her *amici* make the broad argument that late charges are inherently unjust or unfair. But this argument cannot dictate the proper construction of section 85.[18] Whether banks should be allowed to impose late charges is a question of policy, better suited for Congress and the state legislatures than for this Court. Some states choose to prohibit late fees. Other states choose to permit them. Either choice is rational and within the traditional prerogative of the states to regulate the lending practices of banks located within their borders.[19]

[18] Moreover, petitioner and her *amici* are simply wrong that late fees are flatly unjust. States that permit late fees have recognized that there is no social utility in late payments, that late payments impose substantial costs on lenders, and that it is therefore "just" to permit card issuers to require the defaulting cardholders to pay for the consequences of their actions. If credit card issuers were not permitted to charge late fees, then those costs would have to be borne by all card holders—in the form of higher APR's, higher annual fees, or fewer perks. *See* Dunkelberg, at 16. Prohibiting late fees thus has the unfortunate effect of requiring the vast majority of cardholders who make their monthly payments on time each month to subsidize the few who pay late. *Id.*; Baxter, at 1025. Permitting banks to charge late fees, in contrast, compensates the banks for the costs of late payments (including increased credit risk) and deters borrowers from making late payments.

[19] Since 1990, the Legislatures of at least 16 states (including several states that have joined the *amicus* brief in support of peti-

Petitioner's *amici* also claim that, under the California Supreme Court's construction of section 85, "consumers subjected to unfair or illegal credit and collection practices by an out-of-state national bank will have no recourse to their state consumer protection authorities." *Amici* Brief of Mass., *et al.*, at 9. But that is not what section 85, or this case, is about. Consumer protection laws (such as the Truth In Lending Act) protect consumers from fraud and deception. Nothing in section 85 interferes in any way with the ability of the Attorneys General and the various consumer protection agencies of our States from taking strong and immediate action against any card issuer that engages in fraudulent or deceptive credit or collection practices.

Moreover, under the California Supreme Court's construction of section 85, residents of a state are guaranteed

titioner) have recognized that late charges are *not* inimical to consumer interests, and have passed new laws either authorizing credit card late charges or increasing the amount of the late fees that may be assessed. *See* Ariz. Rev. Stat. § 44-1205.C.4 (allowing late charge in any amount agreed to with borrower); Cal. Fin. Code § 4001(a)(1)(C) (allowing late charge up to $15); Colo. Rev. Stat. § 5-3-203 (allowing late charge up to $15); Ind. Code § 24-4.5-3-203.5(4), as amended by rule, 3 Consumer Cred. Guide (CCH) Ind. ¶ 6531 (allowing late charge up to $14.50); Iowa Code § 537.2502.8 (allowing late charge of $10); Kan. Stat. Ann. § 16a-2-502(2) (allowing late charge up to $10); Me. Rev. Stat. tit. 9-A, § 2-501(1)(G) (allowing late charge of lesser of $10 or 5 percent of unpaid balance); Mass. Gen. L. ch. 140, § 114B (allowing late charge of lesser of $10 or 10 percent of unpaid balance); N.J. Stat. Ann. § 17:16C-42(a) (allowing late charge up to $10); N.Y. Banking Law § 108(5)(e); N.Y. Pers. Prop. Law § 413(5)(b) (allowing late charge in any amount agreed to with borrower); Okla. Stat. tit. 14A, § 3-203(5), as modified by rule, 4 Consumer Cred. Guide (CCH) Okla. ¶ 6901 (allowing late charge up to $15); Pa. Stat. Ann. tit. 7, § 322(d)(v) (allowing late charge of greater of $20 or 10 percent of unpaid balance); S.C. Code §§ 37-3-203, 37-1-109 (allowing late charge of lesser of $12 or 5 percent of unpaid balance); Utah Code § 70C-2-102(1) (allowing late charge of greater of $20 or 5 percent of unpaid balance); Va. Code Ann. § 6.1-330.78.A.1 (allowing late charge in any amount agreed to with borrower); Wis. Stat. § 422.202(2m)(a) (allowing late charge up to $10).

the full benefits of the state's rate regulation laws as long as they use credit cards issued by banks in the borrower's home state. See Baxter, at 1025. When a card holder uses a credit card issued by a bank in another state, however, the card holder is deemed to have travelled to the home office of the bank to obtain the loan. *Marquette Nat'l Bank*, 439 U.S. at 311. A state has little interest in regulating the terms of a transaction when its resident has made the choice to travel to *another* state to obtain consumer goods, such as a television or ski equipment, leaving behind the consumer protection laws of the resident's home state. See, *e.g.*, *McBride* v. *Minstar, Inc.*, 662 A.2d 592, 598-99 (N.J. Super. Ct.) (holding under New Jersey's choice of law rules that the claims of a New Jersey resident who purchased allegedly defective ski equipment from a retailer in Massachusetts are governed by Massachusetts law) *aff'd sub nom. McBride* v. *Raichle Molitor, USA*, 662 A.2d 567 (N.J. Super. Ct. App. Div. 1995). Likewise, a state has little interest in regulating the terms of a transaction when its resident has made the choice to travel to another state to obtain a loan from a bank there, leaving behind the interest rate ceilings of the resident's home state. See, *e.g.*, *Commercial Credit Plan, Inc.*, v. *Parker*, 263 S.E.2d 220, 222 (Ga. Ct. App. 1979) (applying South Carolina law to loan from South Carolina finance company to Georgia borrower, under terms that were prohibited by Georgia law, because borrower had travelled to South Carolina to obtain the loan and "the public policy of [Georgia] . . . does not extend to the enforcement of valid contracts made in other states"); *Walker* v. *Associates Fin. Servs. Corp.*, 588 S.W.2d 416, 417-18 (Tex. Ct. App. 1979) (applying Indiana law to loan obtained by Texas resident by mail from Indiana finance company).[20]

[20] In addition, as this Court recognized in *Marquette National Bank* some "impairment" of the ability of the states to enforce laws limiting loan charges "has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit

Another *amicus* contends that consumers, when choosing from among various credit card options, do not consider components of the price other than APR. This contention defies both common sense and elementary economic theory. Moreover, it is contrary to the actual experience of the credit card industry. In the years after the Court's decision in *Marquette National Bank*, credit cards issued by banks in heavily regulated states have been in direct competition with credit cards issued by banks in less regulated or deregulated states. DeMuth, at 231. Although banks in regulated states generally offer a lower APR than banks in deregulated states, the number of credit cards and amount of credit extended by banks in deregulated states has grown at a much faster rate than that of banks in regulated states. *Id.* at 232-36. The explanation is not that consumers prefer to pay a higher APR; rather, the experience of the credit card industry demonstrates that consumers are willing to pay a higher APR in order to obtain credit cards that are of greater value to the consumers because the cards offer better service, additional features or "perks," and broader access to credit. *Id.* at 236-37.

At bottom, then, petitioner and her *amici* are not seeking to give effect to the intent of Congress, or to protect the historic prerogatives of the states, or even to promote consumer welfare. Rather, petitioner and her *amici* seek the assistance of this Court in supporting a category of products—credit cards offered by banks in highly regulated states—that is losing the battle of competition in the credit card market. That case should be presented to Congress, not this Court.

The ultimate effect of accepting petitioner's interpretation of section 85 is clear. The cost of credit for consumers in our States and elsewhere will rise, consumers will have fewer choices in credit card packages, and there will be less credit available overall, particularly for those perceived as the greatest credit risks, including the lower and middle income individuals of our States. See Evans & Schmalensee, at 112-13; Baxter, at 1021-23; DeMuth, at 239-41 & n.102. To be sure, Congress would have the power to adopt such a "silly" law, but it did not do so in section 85. *Cf. TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978).

a neighboring State to receive credit." 439 U.S. at 318. As was true in *Marquette National Bank*, the plea of petitioner here to "alter" section 85 in order to enable the states to apply their lending regulations to interstate loans is "an issue of legislative policy" that "is better addressed to the wisdom of Congress than to the judgment of this Court." *Id.* at 319.

At the end of the day, section 85 (and its analog, section 521 of the DIDA), as interpreted by the California Supreme Court, ensures that states retain the ability to set the terms upon which banks located within our borders may lend money. In contrast, petitioner's interpretation of section 85 interferes with this historic right and would permit other states to govern the lending activities of banks within our borders. Our States urge this Court to reject this intrusion into our legitimate prerogatives.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the California Supreme Court.

Respectfully submitted,

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